JD–74–05
Salsbury, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STANDARD REGISTER COMPANY
EMPLOYER

and 5-RC-15868

GRAPHIC COMMUNICATIONS
CONFERENCE/INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
LOCAL 582-M, AFL-CIO, CLC
PETITIONER

Jeffrey A. Mullins, Esq., and Douglas C. Anspach, Esq.,
of Dayton, Ohio on behalf of the Employer
Daniel B. Smith, Esq.,
of Washington, D.C. on behalf of the Petitioner

ADMINISTRATIVE LAW JUDGE DECISION AND
RECOMMENDATION ON OBJECTIONS

Eric M. Fine, Administrative Law Judge. I heard this matter on July 19, 2005. Based on the evidence as a whole, including my observation of the demeanor of the witnesses,[1] I make the following findings and conclusions.[2]

The petition for election in this matter was filed by the Union on May 2, 2005.[3] Pursuant to a Stipulated Election Agreement, approved by the Regional Director on May 11, an election was conducted on June 10, in the following unit:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Salisbury, Maryland, facility including press room employees, collators, raw materials handlers, finished goods material handlers, pre-press employees, maintenance employees, press production helpers, collating helpers, special machine operators, shipping and receiving employees, general custodians, warehouse employees and forklift operator employees; but excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

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[1] In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness's testimony are not mentioned it is because it was not credited, or cumulative of the credited evidence or testimony set forth above. Further discussions of the witnesses' testimony and credibility are set forth below.

[2] I have considered the parties' post-hearing briefs.

[3] All dates are in 2005, unless otherwise stated.

During the election 59 ballots were cast for the Union, 57 were cast against it, and there were no challenged ballots. The Employer filed timely objections to the election.

On July 1, the Regional Director issued a Report on Objections. The parties litigated at the hearing Employer objections 1, 2, and 3, which read:

1. On at least one occasion, representatives of the Union informed employees that if they signed Union authorization cards and otherwise supported the Union in the campaign, they would receive favorable treatment from the Union in connection with dues, initiation fees, and other assessments, thereby interfering with Section 7 rights of the employees.
2. On at least one occasion, representatives of the Union informed employees that if they did not sign authorization cards or otherwise failed to support he Union, their future employment opportunities would be limited or they would suffer future economic detriment (including being required to make extra payments to the Union), thereby interfering with Section 7 rights of the employees.
3. On at least one occasion, representatives of the Union informed an employee that if the employee did not support the Union, the employee would lose his job and his livelihood. Given the national origin of the employee this was an implicit appeal to national origin and racial prejudice, thereby interfering with the Section 7 rights of the employees.

Patrick O'Hare is the president of Local 582. O'Hare testified that he, along with International Organizers Henry Raumph and Tommy Smith were active representatives of the Union during the organizing campaign.[4] O'Hare testified he met with a group of about 10 employees on a weekly basis in an effort to further the Union's message. O'Hare did not believe employees Harry Thornton or Walter Scott were part of the 10 employees attending these meetings. O'Hare testified Gary Cooper was among the 10 employees. O'Hare denied having any conversations with Scott during the election campaign. O'Hare testified he did not have a specific conversation with Thornton during the campaign, but Thornton may have asked a question at a general meeting, and O'Hare answered it. Raumph testified there were employees he considered leaders who he told to answer other employees' questions during the campaign. Raumph did not consider Thornton and Scott of be in the group of leaders, although he considered Gary Cooper to be. Raumph could not recall any specific conversations with Thornton or Scott. Raumph testified the Union obtained most of its signed authorization cards at meeting. He also testified he gave packs of cards to two employees to distribute to employees, but Thornton, Scott and Cooper were not the two employees Raumph used to distribute cards.[5] Raumph testified he only received cards back from the two employees he handed them out to.[6]

Sandra Adkins is a utility helper working for the Employer at the time of her testimony. Adkins was called as a witness by the Employer. She testified that around the end of May, Thornton made statements to her that "if I didn't go to a meeting to get a card

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[4] O'Hare testified there were also two part time organizers employed by the International Union who played a role in the campaign whose last names O'Hare did not recall.

[5] O'Hare testified that to his knowledge only one employee was given authorization cards for distribution, and Cooper, Scott, and Thornton were not given cards.

[6] I found O'Hare and Raumph, considering their demeanor, to be credible witnesses concerning employee participation and the way the campaign was conducted.

and sign it, I'd have to pay a $100 fine, or $100 to get it plus a fine, possibly." Adkins initially denied, on cross-examination that Thornton said possibly. When pressed she then testified, "I used possibility? He said it would probably cost $100, maybe more, and possibly a fine, something like that." Adkins vacillated as to the timing of Thornton's remarks stating they were around 2 to 3 weeks before the election, and then later they were around 3 to 4 weeks before the election. Adkins then testified Thornton approached her a little later, about 2 weeks before the election and offered to get her a card. Adkins testified the conversations were at work and that Thornton's helper Bob Daisy was present for the conversations.[7] Adkins testified Thornton never gave her an authorization card, that she did not know whether he ever had one, and that she never signed one. Adkins testified she received mail from the Union at her home address during the campaign.

O'Hare credibly testified the Union mailed a leaflet to all employees named on the Excelsior list provided by the Employer. O'Hare testified the Union received none of the leaflets back as undeliverable from the post office. The leaflet contains the type written signature of O'Hare and Raumph as well as several guarantees including the statement, "WE GUARANTEE- That YOU will never pay an initiation fee or fines to the GCC/IBT." The leaflet also states, "VOTE YES-JUNE 10, 2005." O'Hare also testified he attended three union meetings on April 29 at a hotel with the Employer's employees. O'Hare testified that during one of the meetings in response to a question, Tommy Smith stated union dues would be about 2 hours wages per month, and would not come out until a contract is signed, and the International would waive all initiation fees. O'Hare testified that the question of initiation fees came up during another meeting, and O'Hare responded initiation fees would be waived for all current employees at the time of the signing of the contract. O'Hare testified there were about 15 people at the first meeting, 7 at the second, and 20 to 25 for the third which was for the day shift. O'Hare testified the conversations concerning initiation fees occurred at the two meetings with the larger attendance.

Viet Ly was called as a witness by the Employer. Ly worked for the Employer as a plant operator for more than 26 years. Ly testified every day during the weeks prior to the election employees Gary Cooper, Walter Scott, and another individual whose name Ly did not know came up to him and asked him how he was going to vote. Ly responded he did not know and it was personal. Ly testified a couple of weeks prior to the election employee Brant Long told Ly, "if the Union don't come in, the plant may be closed, …". Ly testified only he and Long were present for the conversation.[8]

Ly testified on the day of the election Long came over and asked if Ly had voted. Ly replied he had not voted yet. Ly told Long he would not let him know how he would vote as that was his personal business. Ly testified Long went over and talked to Scott. Ly testified before Ly voted Scott came over and appeared angry. Ly testified Scott said to Ly that, "you act like a VC now, …". Ly testified he asked his supervisor why Scott was angry. Ly testified that VC stands for Vietnamese Cong. Ly is Vietnamese. Ly testified

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[7] Adkins testified there were at least three conversations where there were discussions about the card and her being fined. She testified the only people who could hear the conversations were Thornton, Daisy, and Adkins.

[8] Ly initially testified Cooper and Scott also made a statement about plant closing. Ly then recanted stating he was not sure if Cooper or Scott made the remark. Considering Ly's demeanor, and the substance of his testimony, I find Cooper and Scott never made any remarks about plant closing to Ly.

he thought Scott's remark was made to influence how Ly would vote.[9]

Scott, an employee for almost 30 years, was also called as a witness by the Employer. Scott wore pro union shirts during the election campaign. Scott testified he attended one union meeting and a union picnic. Scott testified he spoke to O'Hare prior to the election mostly in a large group. Scott estimated that he talked to Raumph a couple of times during the election campaign, but Scott denied talking to Raumph in a one on one setting. Scott testified during the election campaign he had occasion to speak to other employees about his pro-union views. However, Scott testified he was never asked to hand out union flyers or shirts to employees, or to get employees to sign union cards.

Scott testified he spoke to Ly during the weeks leading up to the election and Ly was in favor of the Union for a while. Scott testified he heard a rumor before the vote Ly's opinion about the Union had changed.[10] Scott testified, as a result, he spoke to Ly with no one else present. Scott thought the conversation took place the day before the election. Scott testified he asked Ly if "he was wussing out." Scott testified Ly made a smart remark, and Scott said, "You're nothing but a wuss, Viet." Scott told Ly that was why his country was communist because the South Vietnamese army "wussed out."

Scott had served in the United States military in the Vietnam War. Scott testified prior to the election campaign, Scott had discussed with Ly that Scott had spent time in Vietnam. Scott knew Ly was in the South Vietnamese service. Scott testified he had teased Ly over the last 5 to 10 years by calling him, "VC, just to get him going, stuff like that. Kidding around."

A. Analysis

In *Delta Brands, Inc.,* 344 NLRB No. 10, slip op. at 2 (2005) it was stated that:

> It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Id. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Kux Mfg. v. NLRB,* 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit, *Avante at Boca Raton,* 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of alleged coercive incident), See *Antioch Rock & Ready Mix,* 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election. Id.

In *Corner Furniture Discount Center, Inc.,* 339 NLRB 1122 (2003), in an election in which the union won by one vote employee Cosgrove was alleged by the employer to have interfered with the election by threatening three bargaining unit employees that how they voted would

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[9] The Employer called Merrill Eversman, who worked at the plant, to testify. Eversman credibly testified that, on the day of the election, Eversman saw Scott talking to Ly. Eversman could not hear the conversation. After the conversation, when Everson walked by, Ly seemed extremely upset. Ly asked Everson why Scott was talking so crazy.

[10] Scott could not recall if it was Long or someone else who spoke to him about Ly changing his mind.

become known by the Union and that if they voted against it, they would suffer reprisals. In rejecting the employer's argument the Board majority stated:

> We agree that Cosgrove's statements do not warrant setting aside the election. We find, as the judge did, that the record fails to establish that Cosgrove was the Union's agent when he made the statements, and that viewed as third-party conduct, the statements were not objectionable conduct which would tend to create a general atmosphere of fear and reprisal rendering a free election impossible. We so find even if we assume, unlike the judge, that the statements constituted implicit threats of reprisal rather than simple misstatements of fact.
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> The burden of proving an agency relationship is on the party asserting its existence. (Citations omitted.) Here, the Employer does not allege that Cosgrove had actual authority to make the remarks in question. Rather, it contends that he was clothed with apparent authority to speak on behalf of the Union.
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> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. (Citations omitted.) Id. at 1122.

It was concluded the employer had not shown Cosgrove had apparent authority to make the statements in question since there was no evidence the union held Cosgrove out as its spokesman. There was no evidence the union condoned or even was aware of Cosgrove's remarks to employees. In fact a union official explained to employees the election would be conducted by secret ballot. The Board majority held that "evidence that Cosgrove organized and spoke at the Union's campaign meetings, solicited authorization cards, and played a leading role in the campaign does not establish that he was a general agent of the Union." It was stated since a union official participated in campaign meetings and had individual contact with employees it was clear the union had its own spokesman separate from active union adherents. It was stated:

> Accordingly, because we find that the Employer has failed to meet its burden of showing that Cosgrove had apparent authority to threaten employees on the Union's behalf, we find that his remarks are not attributable to the Union, and that the judge properly assessed them under the Board's standards for third-party conduct.
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> As the judge stated, the Board will set aside an election on the basis of third-party conduct only if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizens Hotel,* 270 NLRB 802, 803 (1984); Cal-West Periodicals, Inc., 330 NLRB 599, 600 (2000). The burden of proof lies with the objecting party. *Cal-West Periodicals,* supra at 600. The Board and the courts recognize that conduct by third parties is less likely to affect the outcome of the election, and that because unions (and employers) cannot control nonagents, the equities militate against setting aside elections on the basis of conduct by third parties. This is true even where, as here, a shift in one vote could have changed the outcome of the election. Id. at 1123.

The Board concluded that setting aside the election was not warranted because employees could not have taken Cosgrove's threats seriously in light of the numerous assurances they received from the employer and the union that their vote would be kept confidential.

In *Hollingsworth Management Service,* 342 NLRB No. 50, slip op. at page 4 (2004), the Board citing *NLRB v. Savair Mfg. Co.,* 414 U.S. 270 (1973) stated that:

> Under *Savair,* a union may offer to waive initiation fees if the waiver is 'available not only to those who have signed up with the union before an election but also to those who join after the election.' 414 U.S. at 274 fn. 4. However, a union may not offer to waive an employee's initiation fee on the condition that he sign an authorization card before the election. See Id. at 277. Employees who solicit authorization cards are 'deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting.' *Daylan Engineering,* 283 NLRB 803, 804 (1987). Nevertheless, '[a] union may avoid responsibility for the improper fee-waiver statements of its solicitors ... by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself.' Id. at 805.

In *Hollingsworth Management Service,* supra at 4, statements made concerning the signing of union cards were found not to be objectionable because the union there publicized its lawful fee waiver policy on the card itself and on a plant flyer distributed 3 weeks before the election at the plant gate making clear a waiver of initiation fees would be available to all employees, regardless of whether they signed authorization cards or otherwise showed support for the union before the election.

In *NLRB v. Adair Standish Corporation,* 875 F.2d 866 (6th Cir. 1989) (unpublished), a union passed out authorization cards at a union meeting for employees to distribute. Employee Lachcik was the most ardent union supporter among the employer's employees. Union officials announced during several union meetings that initiation fees would be waived for all current employees, regardless of whether they signed authorizations, and there would be no union dues for the first thirty days after the contract had been approved. During the campaign, Lachcik told an employee if he did not go to union meetings there were people in the shop who would take his job when the union was certified, that the employee would not have a job if he did not sign an authorization card, and that if workers did not sign a card after the election they would have to pay an initiation fee to the union, if they did sign a card the fee would be waived. The employee testified that Lachcik showed him and other employees' union cards, but the employee never saw Lachcik hand any out. The court held a union is not responsible for the acts of an employee, unless the employee is an agent of the union. The court rejected the employer's argument that because authorization cards were available for Lachcik's distribution, the union was responsible for his remarks. The court stated, "Respondent's argument must be rejected because substantial evidence supports the Board's finding that Lachcik never solicited signatures." There three employees testified they had not seen Lachcik handing out cards for signature, and no employee testified that Lachcik asked him to sign a card. The court stated, "At most, respondent has shown that the union made authorization cards generally available at union meetings. That is not the equivalent of instigation, authorizing, soliciting, ratifying, condoning or adopting Lachcik's actions."

In the instant case, employee Thornton attended union meetings, but he was not among the group of employees who were considered by Union officials O'Hare or Raumph to be employee leaders. O'Hare credibly testified that most authorization cards were signed during the course of three shift meetings held on April 29 by the Union at a hotel, which was attended by the Employer's employees. Raumph testified he thereafter gave packets of cards to two employees, that he received only about 10 back, and that they were returned by these two employees. Both O'Hare and Raumph credibly testified that

Thornton was not given cards for distribution by the union officials.[11]

Employee Adkins testified that some time during the critical period Thornton made statements to her that "if I didn't go to a meeting to get a card and sign it, I'd have to pay a $100 fine, or $100 to get it plus a fine, possibly." Adkins later testified Thornton said, "it would probably cost $100, maybe more, and possibly a fine, something like that." Adkins then testified Thornton approached her a little later, about 2 weeks before the election and offered to get her a card. Adkins testified the conversations were in the presence of another employee. Adkins testified Thornton never gave her an authorization card, that she did not know whether he ever had one, and that she never signed one.

There was no evidence presented that Thornton had actual authority by the Union to make the remarks attributed to him by Adkins because as the testimony shows he had no special status within the union campaign. Moreover, the tenor of Adkins' testimony reveals that Thornton gave her a rather ambiguous account of the Union's alleged initiation fee and fine policy. As he only spoke of possibilities of a fine, and estimated the size of the initiation fee. Thus, the nature of the information Thornton provided Adkins undermines any claim that he had apparent authority to speak on behalf of the Union. I also do not find that Thornton was serving as a special agent of the Union under the Board's decision in *Daylan Engineering,* 283 NLRB 803, 804 (1987). In this regard, Thornton merely announced a vague policy to Adkins at a time that he did not ask her to sign a card. Thus, Thornton's pronouncement was not made in the act of soliciting Adkins' signature, and therefore he never achieved special agent status. See, *Hollingsworth Management Service,* supra; *Daylan Engineering,* supra; and *NLRB v. Adair Standish Corporation,* supra. The fact that in a subsequent conversation Thornton offered to get Adkins a card does not establish that he made improper remarks to Adkins while soliciting her signature. Adkins testified Thornton never gave her an authorization card, that she did not know whether he ever had one, and that she never signed one. See, *NLRB v. Adair Standish Corporation,* supra.[12]

I have therefore concluded that Thornton did not engage in conduct that could be attributed to the Union, and that his statements to Adkins did not constitute objectionable conduct. Moreover, any pronouncements Thornton made to Adkins concerning the Union's policy concerning fines and initiation fees were cured by the Union's pronouncements at two meetings to employees that the International would waive all initiation fees, and by a flyer mailed by the Union to all employees on the Excelsior list containing the statement, "WE GUARANTEE- That YOU will never pay an initiation fee or fines to the GCC/IBT." While O'Hare failed to precisely testify when the leaflet was mailed I find it was mailed during the critical period as it contains the statement, "VOTE YES-JUNE 10, 2005." I find that Adkins received the leaflet as she testified she received correspondence from the Union. I do not find it determinative that Adkins was not asked

[11] I do not find the Employer's argument that since O'Hare could only recall one employee had cards for distribution, and Raumph named two employees that this establishes the Union lost control of who was distributing cards. Rather, it shows at best that cards were given to three individuals rather than two, that is assuming arguendo O'Hare gave them to someone other than the individuals named by Raumph. It does not demonstrate that cards were readily available to the general employee population for distribution. Moreover, both O'Hare and Raumph testified that Thornton was not given cards.

[12] It has been held that the failure of a solicited employee to sign a card renders statements made as inducements for their signature by co-workers non-objectionable. See, *Woodlands Health Center,* 325 NLRB 351, 367 (1998)

whether she read the statement, because the Union's only burden was to clearly publicize a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. See, *Hollingsworth Management Service,* supra; and *Daylan Engineering,* supra. A leaflet mailed to the homes of the eligible voters clearly satisfies that requirement. Here, the leaflet was mailed to Adkins home and it reached her before she signed a card since she never signed one. Moreover, I do not find the statement contained in the leaflet to be ambiguous as contended by the Employer.

In sum, I find Thornton engaged in conduct that was isolated and was not objectionable as it could not be attributed to the Union. Moreover, the Union cured any actions taken by Thornton by the pronouncements the Union made during the campaign. Accordingly, I recommend that objections 1 and 2 be denied.

In *Englewood Hospital,* 318 NLRB 806, 806-807 (1995), the Board citing *Sewell Mfg. Co.,* 138 NLRB 66 (1962), stated:

> In *Sewell,* supra, the Board held that it would set an election aside when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals to racial prejudice. The Board, however, also made clear that not every racial reference made during an election campaign is objectionable. The Board in *Sewell* distinguished objectionable conduct from isolated, casual, prejudicial remarks, and emphasized that it did not intend to condemn relevant campaign statements merely because they have racial overtones.
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> * * * *
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> The Board has also emphasized that the rule of *Sewell* 'concerns prejudiced campaign propaganda issued by a party to the election, not expressions of employee bias independent of the party's own actions.' *Benjamin Coal Co.,* 294 NLRB 572, 573 (1989). As the Board explained in *Baltimore Luggage Co.,* 162 NLRB 1230 (1967):
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> > Consequently, in *Sewell,* we did not lay down the rule that parties would be forbidden to discuss race in representation elections. Rather, we set aside an election because the campaign arguments were inflammatory in character, setting race against race--an appeal to animosity rather than to consideration of economic and social conditions and circumstances and of possible actions to deal with them.

In *Shawnee Manor,* 321 NLRB 1320, 1320 (1996), the Board refused to set aside an election based on race related remarks of an employee to coworkers. The Board stated the alleged remarks did "not rise to the level of a sustained appeal to racial prejudice." See also *Seda Specialty Packaging Corp.,* 324 NLRB 350, 352-353, fn. 5, where racial remarks at a single meeting were found to be insufficient to warrant setting aside an election and *Beatrice Grocery Products,* 287 NLRB 302 (1987), enfd. 872 F.2d 1026 (6th Cir. 1989), holding that elections would not be set aside by isolated, casual, prejudicial remarks.

In *DID Building Services v. NLRB,* 915 F.2d 490 (9th Cir. 1990), a union won a representation election by a vote of 11 to 6, an employee supporting the union was found to have made racial slurs in front of three employees against the employer's ownership in an effort to garner Mexican employees support for the union. In sustaining the Board's finding that the union did not engage in objectionable conduct concerning the use of racial slurs, the court stated:

> …despite Contreras's vigorous support for the Union, he participated in its campaign only to a limited degree; he attempted to solicit only three signed cards and never obtained even one. Also, the Union never condoned Contreras's abhorrent comments. Indeed, no evidence suggests the Union even knew of them. Id. at 497.

The court concluded Contreras was not acting as the union's agent when he made the slurs. The court stated it will give less weight to third-party than to party misconduct in evaluating its impact on elections. The court explained employees will give less import to other employees "possibly impulsive conduct" induced during the heat of a campaign than to a parties' planned conduct. The court stated that, "as a practical matter parties cannot prevent supporters' misconduct, so that attaching the same weight to third-party and party actions 'would lead to endless and pointless repetitions of elections.' (citation omitted.) The court adopted the following standard for third party appeals to prejudice, stating, "To require election invalidation, an employee's appeal to prejudice must to taint the election atmosphere as to render free choice of representation impossible." The court stated the Board correctly interpreted the law in concluding the incident involving Contreras did not so taint the election as to render free choice of representative impossible.[13] The court noted the incident was isolated and did not reflect the theme of the union's campaign. The slurs did not involve a sustained or pervasive appeal to prejudice, and because they occurred in a heated discussion the employees who overheard them "probably discounted them as impulsively made." Id. at 498-499.

In the present case, the credited testimony reveals Ly was approached by employee Long on the day of the election. Long asked Ly if he had voted. Ly replied he had not voted yet. Ly told Long he would not let him know how he would vote as that was his personal business. Long went over and talked to employee Scott. Ly testified Scott came over and appeared angry. Ly testified Scott said to Ly, "you act like a VC now, …".[14] Scott testified Ly was in favor of the Union for a while. Scott testified he discovered before the vote that Ly's opinion about the Union had changed. As a result, Scott testified that, during the conversation in question, Scott asked Ly if "he was wussing out." Scott testified Ly made a smart remark, and Scott said, "you're nothing but a wuss, Viet." Scott told Ly that was why his country was communist because the South Vietnamese army "wussed out." Scott testified no one else was around when Scott made the statement.[15]

I do not find Scott's remarks, although unfortunate and intemperate, require the setting aside of the election. Scott was a union supporter, with no other special ties to the

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[13] See also *Cross Pointe Paper Corp.,* 330 NLRB 658, 661 (2000), where a similar standard was applied in evaluating the impact of a racially charged rumor the genesis of which was not attributable to either party to the election.

[14] I have credited Ly over Scott that the conversation in play took place the day of the election, as opposed the day before the election, as Scott recalled. Ly's recollection of the date of the conversation was a lot clearer than Scott's, and Ly was corroborated as to the timing of the incident by the testimony of Eversman, who saw, but did not hear the exchange.

[15] I have credited Scott's version of the conversation. Scott testified in a credible and straight forward fashion as to the exchange, and he had a better memory of the specifics of what was said than Ly. Contrary to assertions made at page 10 of the Employer's post-hearing brief, there was no testimony by either Ly or Scott that Scott asked Ly how Ly was going to vote during the conversation.

Union to give him actual or apparent authority to speak on the Union's behalf.[16] Scott's remarks were isolated, and did not attribute any racially related views or conduct to either the Employer or the Union. In fact, Scott, a Vietnam veteran, testified he had teased Ly over the last 5 to 10 years by calling him, "VC, just to get him going, …". Ly had no basis to conclude Scott's remarks represented the views of the Union, and Scott's remarks to one employee on one occasion did not constitute a sustained appeal to racial prejudice, nor did Scott's remarks to Ly so taint the election as to render free choice of representative impossible. In fact, Scott's remarks had nothing to do with treatment of Vietnamese by the Union or the Employer,[17] and would just as likely have caused Ly to vote against the Union as for it as the remarks could have driven Ly away from supporting Scott's cause. Given the tenor of the remarks it is unlikely that they impacted on Ly's vote at all. I do not find the remarks would serve to obfuscate the true campaign issues for Ly or any other voter. Moreover, there was no evidence that Ly informed anyone else of what Scott said prior to the election.[18]

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[16] The credible testimony of the Union officials reveals Scott was not among the 10 employees they considered to be leaders in the campaign. Scott credibly testified he wore a union shirt to work, attended a couple of meetings, but was never asked to distribute union paraphernalia, flyers, or to solicit employees to sign cards.

[17] See, *Case Farms of North Carolina v. NLRB,* 128 F.3d 841, 846 (1997), finding a flyer issued by a union not to be inflammatory because it made no claim that the employer there was prejudiced against a particular ethnic group, nor did it attempt to inflame the employees against another racial or ethnic group. *YKK (U.S.A.) Inc.,* 269 NLRB 82 (1984) cited by the Employer is inapposite to the facts presented herein. In that case an international representative of the union made racial slurs directed towards the employer's management at two separate meetings the first attended by about 100 employees, the second in front of 75 to 100 employees. Numerous other racial epithets were written and uttered during the campaign, including handbills by the union, and statements by union officials. The campaign was also marred by several acts of violence and threats of violence.

[18] Respondent argues in its post-hearing brief that where a shift of one vote could have changed the outcome of an election the Board will carefully scrutinize any misconduct, including third party misconduct. While close elections do require close scrutiny, the alleged misconduct must nevertheless meet the Board's standards to be deemed objectionable for an election to be set aside. *Corner Furniture Discount Center, Inc.,* supra at 1123. For reasons set forth above, I do not find there was objectionable conduct in the instant case. Cases cited by the Employer here do not require a different result. In *Woodlands Health Center,* 325 NLRB 351, 368 (1998), an employee was found to be an agent of the union for remarks made during the solicitation of an authorization card, and the solicited employee eventually signed a card. Moreover, because no exceptions were filed, the Board did not pass on the judge's findings that the conduct was objectionable. Id. at 351, fn. 2. In *Hopkins Nursing Care Center,* 309 NLRB 958 (1992), a threat by the director of nursing of loss of benefits to two nursing assistants because of their union activities in circumstances where the threat could be heard by other employees was found to be objectionable conduct. *Phillips Chrysler Plymouth,* 304 NLRB 16 (1991), involved a disturbance created by two union organizers the day of the election in the presence of 10 employees. The Board majority concluded the union had engaged in objectionable conduct warranting the setting aside of the election noting the incident was a major one that continued for some time. In *Buedel Food Products, Co.,* 300 NLRB 638 (1990), a threat by a former employee to burn an employee's car if he did not vote for the union was found sufficient to create an atmosphere of fear and appraisal to warrant setting aside the election as it was a specific threat to do substantial damage. In *Copps Food Center,* 296 NLRB 395 (1989), conduct was found objectionable when directed at one employee because it was remarks by a supervisor including the threat of discharge and blackballing if the employee signed a union card.

Accordingly, I recommend that Employer's objection 3 be denied.[19]

CONCLUSIONS

Based on the forgoing, I recommend that the Employer's Objections 1, 2, and 3 be denied and that this matter be remanded to the Regional Direction for the issuance of the appropriate Certification of Representative.

Within 14 days from the issuance of this decision, any party may file with the Board in Washington, DC, an original and seven copies of exceptions thereto. Immediately upon filing such exceptions the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 5. If no exceptions are filed, the Board will adopt the recommendations set forth herein.

Dated, Washington, D.C. September 13, 2005

Eric M. Fine
Administrative Law Judge

[19] Ly also credibly testified that a couple of weeks prior to the election employee Long, a union supporter, told Ly, "if the Union don't come in, the plant may be closed, …". Ly testified only he and Long were present for the conversation. The Employer did not argue this statement by Long constituted objectionable conduct in its post-hearing brief, nor do I so find. There was no evidence to establish Long had actual or apparent authority on behalf of the Union to make this remark. Moreover, no evidence was presented to establish Long, an employee, had any special knowledge, or the wherewithal to carry out any such prediction, or that Ly had any reasonable basis to believe that Long's remarks were more than the mere puffing of a co-worker. Long made no reference to Ly's national origin while making this remark.